Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1623

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner Indiana & Michigan Electric Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, and appears in the Appendix hereto at pp. 1a-4a. The Court's denial on January 18, 1980, of the petitioner's motion for rehearing appears in the Appendix hereto at

pp. 5a-6a. The decision and order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 236 NLRB No. 110 (1978), and appears in the Appendix hereto at pp. 7a-12a. The decision of the Administrative Law Judge in this case appears in the Appendix at pp. 13a-36a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 23, 1979. The petition for rehearing was denied on January 18, 1980, and this petition for certiorari is being filed within 90 days of the latter date. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether Sections 8(a)(1) and (3) of the National Labor Relations Act prohibit an employer, which chooses to operate during an economic strike, from deferring the placement of employees on paid leave status until the termination of the strike.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 158

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization:

. . .

Section 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

STATEMENT OF THE CASE

This case involves an order of the Board, enforced by the Court of Appeals, forbidding a Company, which chooses to operate during an economic strike, from deferring the placement of its employees on a leave status for the duration of the strike.

The Indiana & Michigan Electric Company (herein referred to as the Company) is an Indiana corporation engaged in the generation, transmission, distribution and sale of electric power in Indiana and other states. The River Transportation Division of the Company, which is involved in the present case, is a division of the Company engaged in the transporation of coal by river barge on the Ohio, Kanawha and Green Rivers. The coal is transported

from the various coal producing States, including those in the west, to various power plants located on the rivers noted above.

The Company recognized and had contractual relations with the United Steelworkers of America (herein referred to as the Union) prior to November 18, 1976, in two different bargaining units of the Company's employees, each having its own local union and each having its own separate collective bargaining agreement.

The first bargaining unit was commonly known as the "officer unit" and was represented by Local 14259 of the Union. The second bargaining unit, commonly known as the "deckhands unit" was represented by Local 14811 of the Union.

Prior to November 18, 1976, the parties had held four or five bargaining sessions seeking new collective bargaining agreements in both units, but were unable to come to an agreement in either unit prior to the identical expiration dates of November 18, 1976.

On November 11, 1976, the Company gave the Union final offers in both units. The employees in both units rejected these offers and voted to strike. The strike began on November 18, 1976, and lasted until December 29 or 30, 1976. During the strike, the Company continued to operate the barges on a "limited" basis, using supervisory employees, nonrepresented personnel (dispatchers and office help) and employees who returned to work during the strike.

When the strike began, Mr. George Shamblin, the Company's manager, issued a letter dated November 18, 1976, to all represented employees which stated in pertinent part that:

> Employees who left the boats and went on strike shall receive no pay from the time they left the boats. They shall not be put on an accumulated leave pay status.
>
> Boat employees now on accumulated leave shall be kept on that status until 21 days from the time they last left the boat, or earlier if they had less than 21 days accumulated. If they do not come back to work then, this pay will stop.
>
> Terminal employees on strike shall receive no pay from the time they went on strike.
>
> Pay will begin for any employee when he returns to work.

In order to understand this communication, it is necessary to understand the concept of accumulated leave status. The normal "tour" of a boat employee is twenty-one days on the boat. During those days the employee lives on the boat and has twelve hour duty periods with alternating six hours on and six hours off. At the end of his tour, the boat employee is relieved and is normally placed on an accumulated leave status for twenty-one days when he returns to his home and does no work for the Company. The work cycle then picks up again after the normal twenty-one day period of accumulated leave. During these normal work-accumulated leave status cycles the boat employees are paid twice a month—the paydays being the 7th of the month and the 22nd of the month. The payday on the 7th covers the pay period from the 16th to 30th or 31st of the preceding month. The payday on the 22nd covers the pay period from the 1st to the 15th of that month. If an employee starts his work tour on January 1 and is relieved in the normal fashion on January 22, then he would be paid for the days worked from January 1 through January 15. On February 7 he would be paid for the six days worked (January 16-21) and ten days of accumulated leave pay (January 22-31). If the employee was on a regular twenty-one day cycle, he would return to

the boat on February 11. On February 22 he would be paid ten days accumulated leave (February 1-10) and five days worked (February 11-15). The process then simply continues in the same fashion.

It is important to note here that employees are never paid for more than 15 or 16 days in any pay period. This means that the accumulated leave pay for employees placed on that status by the Company is never paid in a lump sum upon the employee's being relieved of his tour, but rather is paid out over successive pay periods of 15 or 16 days.

There are regular occasions when employees are extended beyond their normal tour of twenty-one days. When employees are extended beyond their normal tour, the employees' accumulated leave status is deferred; they continue to be paid for the days actually worked and they continue to build up or bank additional accumulated leave days. Days worked are always paid before accumulated leave days.

It is evident from the foregoing that at any particular time, such as November 17, 1976, approximately one half the boat employees will be working on the boats and the other half will be on accumulated leave status.

As the letter above states, and as the evidence demonstrated, the Company policy with respect to those working on November 17, 1976, and who left the boats on that day as a result of the strike was that they were paid for all days worked through November 17, 1976. It was thus uncontradicted that on November 22, 1976, some 4 days after the strike began, the Company paid employees for all days worked between November 1 and November 15, and that on December 7, 1976, the Company paid employees for all work between November 15-17. It is, however, equally uncontradicted that on the December 7 payday there was no accumulated leave pay paid to any boat

employee who left the boat on November 17 in connection with the strike, even though such employees would have received accumulated leave pay on that date if they had, for example, been normally relieved of their tour on that day. As to the varying number of days of accumulated leave that these employees otherwise would have been entitled if, for example, they had been normally relieved of their tour on November 17, 1976, the Company simply deferred all accumulated leave status until the end of the strike.

There was no dispute that when the strike ended and the employees returned to work, the approximately half of the workforce which was not scheduled for actual work on the boats began their accumulated leave status and began on the January 7, 1977, payday to receive accumulated leave pay on December 30 and 31 and continued on the January 22, 1977, payday to receive accumulated leave pay for January 1-January 15 period.

The situation with respect to those who were on accumulated leave status on November 17, 1976, was somewhat different. Not knowing whether those employees were sympathetic to and would have joined the strike that occurred on November 17, 1976, the Company continued those employees on an accumulated leave status for 21 days from the time they last left the boat or earlier if they had less than 21 days accumulated leave. If those employees did not return to work at either of those times, their pay was stopped. Thus, for example, if an employee had built up accumulated leave days in excess of twenty-one, and on the 21st day from the day he left the boat and would ordinarily return to work, the Company deferred his accumulated leave status and pay until the termination of the strike. Once again, however, it is undisputed that when the strike was terminated any deferred accumulated leave for such employees was paid to the employees in the normal fashion.

In addition to the Company policy and how it operated, further light is shed on the Company's accumulated leave policy by reference to the two collective bargaining agreements.

Thus, in the officers' contract, Article XVI(d) provided that:

> Accumulated time shall be taken in a manner which will not interfere with the normal operations of the Company's business.

Also, subsection (f) of the same agreement provides:

> The Company agrees to see that an employee subject to this Agreement takes his time off at a mutually agreeable time that will not interfere with the proper operations of the boat.

With respect to the deckhands' contract, Article XX, subsection 3, provides that:

> The Company agrees to see that all employees take their time off at a mutually agreeable time that will not interfere with the proper operation of the boat.

Also, Article XXII, subsection (d), provided the following:

> Free time shall be taken in a manner which will not interfere with the normal operations of the Company's business and free time may not be resold to the Company.

There was evidence with respect to a previous strike at the Company in which the Company placed strikers on an accumulated leave status when the strike began, and paid off all accumulated leave during the course of the strike. There was also evidence that this practice had caused a serious operating problem at the conclusion of the strike. When the strike was terminated on that occasion,

everyone had run out of accumulated leave days. Under past practice, the most senior employees had the right to return to work immediately. Since there was no accumulated leave paychecks due for employees, the senior half of the workforce opted to return to work immediately. Since there are several job classifications in ascending order of skills and qualifications, and since the senior employees are generally the highest skilled and most qualified employees, these senior employees were, in many cases, overqualified for the work they were performing during the first post-strike tour. This in itself did not cause a problem. The problem came when their tour ended and the junior half of the boat employees took over. They were not qualified to perform the higher skilled jobs. Thus, there was a problem in manning the boats for the second tour after the termination of the strike with fully qualified employees.

Another problem was that the junior employees, who did not get to return to work immediately after the strike, had to wait over a month after the end of the strike before getting a paycheck.

These problems are solved by deferring accumulated leave status until the end of the strike. At that time those with the largest amount of accumulated leave time generally chose not to return to work immediately, whereas those with the least amount of accumulated leave time returned to work immediately. This preserved the proper mix of senior and junior, skilled and unskilled employees to man all positions on the boats for the tours immediately following the strike. In addition, such a system permitted paychecks for all employees to start flowing immediately after the termination of the strike. In short, it preserved the exact status quo until the termination of the strike.

In holding that the Company's conduct violated Section 8(a)(1) and (3) of the Act, the ALJ made the following findings:

1. That Respondent held back wages already earned by some 182 employees because they went on strike (p. 21a). He termed this the "crux" of the case against the Company.

2. That the *Texaco* case, 179 NLRB 989 (1969), which he acknowledged was "quite similar" to the present case, in which the Board held that an employer did not violate the Act by deferring already scheduled vacations during a strike until after the strike, was distinguishable from the present case because it involved the deferral of a "fringe" benefit, as opposed to wages (p. 21a).

3. That Respondent discriminated by treating those who were on accumulated leave status when the strike began better than those who were on duty (p. 22a).

4. That the impact of Respondent's conduct with respect to accumulated leave was not comparatively slight, but rather was inherently destructive of important employee rights (pp. 22a-23a).

5. That Respondent had a legitimate business justification for its action with respect to accumulated leave, but it was not substantial (p. 26a).

In its decision the Board stated its agreement with the conclusion of the ALJ that the Company violated Sections 8(a) (1) and (3) of the Act, but that it did so "for reasons other than those articulated by the Administrative Law Judge" (p. 8a).

The Board held that the Company's action "evinced an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike"

(p. 9a). The Board's summary decision contained no discussion of the applicable cases cited by the Company in support of its action. In fact, the decision refers to no precedent at all.

In addition, the Board decision found irrelevant the legitimate and substantial business justification advanced by the Company (pp. 9a-10a).

The *per curiam* decision of the United States Court of Appeals consisted of a summary one paragraph affirmance of the Board decision.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises Significant and Recurring Problems Concerning an Employer's Ability To Operate During An Economic Strike

The issue raised in this case is whether an employer who chooses to operate during an economic strike must permit his employees for a part of the strike to be on a paid leave status, thereby minimizing the possibility of their returning to work, or whether an employer can defer that paid leave status until the strike is over.

The decision, therefore, is far broader than the factual context of the river transportation industry involved in this case. It impacts on industry generally, particularly the common situation where employers who operate during a strike seek to defer vacations occurring or scheduled during a strike.

The present case does *not* involve the line of Board and Court cases holding that an employer's withholding of accrued vacation pay to strikers while granting such pay to nonstrikers violates Section 8(a)(1) and (3) of the Act.

NLRB v. *Great Dane Trailers, Inc.* 388 U.S. 26 (1967); *NLRB* v. *Duncan Machine Works, Inc.* 435 F. 2d 612 (7th Cir. 1970); *NLRB* v. *Frick Company*, 397 F. 2d 956 (3rd Cir. 1968); *Cavalier Division of Seeburg Co.*, 192 NLRB 290 (1971).

The leave status and leave pay in the present case had not been earned or accrued at the time of the strike because under the collective bargaining agreements employees became entitled to go on leave and receive leave pay when they were either relieved by the Company with other employees or by mutual agreement between the employee and the Company at a time when leave status would not interfere with normal operations. The strike satisfied neither of these conditions.

This case, therefore, deals only with the *scheduling* of paid leave time during a strike—not the granting or withholding of the leave or the pay. It was uncontradicted in this case that after the strike was concluded the Company continued its normal rotation of crews and that all leave time was paid.

Why is it important for employers to be able to defer vacations or paid leave during a strike? It is important because any employer who chooses to operate during a strike—as is its right—is naturally seeking to control absences due to any reason other than the strike. The employer is helpless to control absences due to the strike. But it is not and should not be helpless to control absences due to any other reason, such as paid leave, when, under the contract, it has discretion with respect to when employees are placed on a paid leave status.

If such an employer is unable to exercise his contractual discretion in scheduling paid leave during a strike, and is forced to grant such paid leave, the employer not only loses control over absences due to such paid leave, he actually is being required to subsidize the strike

against his facility by paying wages to persons while they are on strike. This, in turn, upsets the traditional balance between the competing economic forces in a labor dispute—the unions force in shutting down or curtailing the operation of the employer and the employer's force in shutting off wages to the striking employees and seeking to operate during the strike. There is obviously little or no incentive to settle for those on strike if they are being granted a paid leave during the strike.

II

The Decision Below Conflicts With A Decision Of The First Circuit Court of Appeals and with Decisions of This Court and Prior Decisions of The Board

The decision below is in conflict with the decision of the United States Court of Appeals for the first Circuit in *NLRB* v. *Borden, Inc.*, 600 F. 2d 313, 101 LRRM 2727 (1st Cir. 1979). In the *Borden* case, the Board had held that an employer's deferral of payment of accrued vacation pay during a strike was employer conduct which was "inherently destructive" of employee rights and violated Sections 8(a)(1) and (3), even if motivated by business considerations, and absent a showing of antiunion motivation. The Board purported to rely on this Court's decision in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), as did the Administrative Law Judge in the present case. The First Circuit disagreed holding:

> We do not view Borden's delayed payment of vacation benefits as conduct which bears its own indicia of intent carrying with it unavoidable consequences which the employer must have intended. This was, after all, a delay in vacation payments, not a refusal to pay at all. 600 F. 2d at 321.

The Court remanded the case to the Board to determine whether Borden's business justification was pretextual.[1]

In the present case the Board decision, summarily enforced by the Court below, concluded that:

> Respondent's actions evinced an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike (p. 9a).

For this reason the Board held that any business justification of the Company's action was "of no consequence here". Without citing *Great Dane Trailers*, the Board evidently concluded that the Company's policy of deferring leave and leave pay was conduct inherently destructive of employee rights, thereby obviating the need to consider business justification.

The decision of the Court below embraced this overextension of the *Great Dane Trailers*, holding on the wholly mistaken premise that "the sole issue on this appeal is whether the Board's order was supported by substantial evidence" (p. 2a).

Thus the Fourth Circuit and the First Circuit are in conflict over the issue of whether deferral of leave pay or vacation pay during a strike is, under the *Great Dane Trailer* formula, conduct that is so "inherently destructive of employee interests that it may be deemed proscribed without need for proof of an improper notice" or whether the employer conduct has a "comparatively slight" effect on employee rights and may be justified by substantial

[1] On remand the Board found that the employer's business justification was pretextual. *Borden, Inc.*, 248 NLRB No. 60 (March 12, 1980).

and legitimate business reasons.[2] That issue is a legal issue, not one of substantial evidence.

With respect to the "inherently destructive" versus "comparatively slight" dichotomy, any fair analysis of the actions taken by the Company here must yield the conclusion that deferring the placement of employees on accumulated leave status until the termination of the strike had a comparatively slight effect on employee rights under the Act.

The Company's action did not deprive any employee of his accumulated leave. Concededly, those monies were paid at the termination of the strike. The comparatively slight effect of the Company's action is best illustrated by the Board order in this case, which measured the alleged "harm" to employees as the interest on the accumulated leave money for the approximately one month that the strike lasted. At a maximum, therefore, if an employee would have received accumulated pay of 21 days starting on November 17, and the total pay were, for example $1,000, the yearly interest at 6% would be $60, making the one month interest $5. By anyone's measurement this is a "comparatively slight" harm. To call it "inherently destructive" of employee rights is to make a mockery of the English language.[3]

[2] It is to be noted that vacation pay in the *Borden* case was an "accrued" benefit. Elsewhere in this brief it has been demonstrated that the leave pay involved in this case was not "accrued" at the time of the strike. Even if the Court were to disagree with Petitioner and find that the leave pay here involved was "accrued" at the time of the strike, the conflict in the circuits obviously remains.

[3] Since the Board and the Court below found that the employer's legitimate and substantial business reasons for its conduct were "of no consequence," by reason of their finding that the conduct was "inherently destructive of employee rights," there is no reason in this petition to elaborate on these

(*footnote continues*)

The philosophy inherent in the Board decision and its extension of the decisions of this Court in *Great Dane Trailers* is both naive and at war with equally important principles enunciated by this Court over the years.

It is naive because it assumes that parties to a labor dispute cannot use ordinary economic weapons or powers in support of their respective bargaining positions.[4] This Court has been attempting over the past twenty years, without much success, to instruct the Board that apart from conduct that is inherently destructive of employee rights, there is a broad zone of freedom for parties involved in a labor dispute to exercise their economic powers.

In *NLRB* v. *Insurance Agents Union*, 361 U.S. 477 (1960), the Supreme Court reversed the Board's conclusion that certain harassing tactics used by a Union in connection with its economic dispute with an employer violated the Act. The Court made it quite clear in that decision that the Board was not to act "as an arbiter of the sort of *economic weapons* the parties can use in seeking to gain acceptance of their bargaining demands", and that the Board had no proper role in introducing "some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' *economic weapons* ..." The Court held that the Board's intrusion into this area "amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress had not countenanced". 361 U.S. at 497, 498

(*footnote continued*)

reasons other than noting that the Company justified its conduct on the basis of its continuing operations during the strike and its need for an orderly post-strike operation.

[4] The Board even singles out the term "economic weapons" used by counsel for the Company in its brief to the Board as evidence cited in its decision of a violation of Sections 8(a)(1) and (3) (p. 9a).

In *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), the Supreme Court had occasion to reaffirm those views when it reversed the Board's long-standing theories of illegality of employer lockouts in labor disputes. Again, the Court noted: "The Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management". The Court cautioned:

> Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to *economic weapons* should more peaceful measures not avail. Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny *weapons* to one party or the other because of its assessment of that party's bargaining power. 380 U.S. at 317. (Emphasis added)

This same principle was once again affirmed by the Supreme Court in *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). There the Court held:

> The Congressional policy manifest in the Act is ... to allow the balance of bargaining advantage to be set by economic power realities. 405 U.S. at 288.

The entire thrust of the Board decision is that the Company violated the law because "the purpose of the leave policy clearly was to force employees to abandon the strike" (p. 9a). If that quote is analyzed for a moment, its fallacy becomes evident. During a strike, the Company

stops its regular payment of wages to the striking employees. Is not the purposes of cutting off wages to influence employees to abandon the strike? The Board itself has ruled that during an economic strike the employer may offer jobs to the striking employees under the terms and conditions in the employer's last offer to the Union, even if those terms and conditions are better than the employees enjoyed before the strike. *Coca Cola Bottling Co. of Louisville*, 166 NLRB 134 (1967). It is obvious that the purpose and effect of such conduct is to influence the striking employees to abandon the strike and return to work. The same is true of the employer's right to replace strikers in an economic dispute, as well as to lockout employees in such a dispute.

It is obvious from the above that the Court intended the *Great Dane Trailer* case type of "inherently destructive" conduct to be a narrow exception to a broad zone of freedom permitted to parties in a labor dispute to exercise their respective economic powers. The Board and Court extension of the *Great Dane Trailers* decision to cover the type of conduct involved in this case clearly trespasses on an area this Court has instructed the Board on numerous occasion to stay out of, and is even in open conflict with prior decisions of the Board permitting an employer to defer vacation or leave time during a strike. Thus in *Texaco, Inc.* 179 NLRB 989 (1969), the Company deferred the taking of paid vacations until the termination of the strike. The ALJ, with Board approval, upheld the practice, finding 1) that the parties contractual arrangement gave the Company the discretion to schedule vacations in a manner that would least interfere with the Company's operation; 2) that the Company could control absences due for reasons other than the strike, such as vacations, in

order to operate during the strike, and 3) that the vacations were "not merely cancelled, but were rescheduled". For these reasons the Board held that it was

> unable to find that Respondent's conduct with regard to vacations during the strike was so destructive of employee rights or so unrelated to a legitimate business interest as to warrant an inference that Respondent's motives were unlawful. 179 NLRB at 994

The ALJ, with Board approval, then concluded that:

> . . . Respondent's actions with regard to its vacation-strike policy had only a minor impact on the strike; did not significantly discourage membership in the Union; was not intended by Respondent to do either; and did serve a legitimate business interest in continuing its operations. *Id.*

See also *Detroit Edison Co.*, 206 NLRB 818 (1973), and *G.C. Murphy Co.*, 207 NLRB 579 (1973).

The Board's position in those cases is in direct conflict with its decision in the present case.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted

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Appendix

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 78-1753

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INDIANA & MICHIGAN ELECTRIC COMPANY,
Respondent.

No. 78-1754

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Review of Judgement Filed June 14, 1978

Argued October 2, 1979
Decided November 23, 1979

Before HAYNSWORTH, Chief Judge, WINTER and SPROUSE, Circuit Judges

---

Helen L. Morgan, NLRB (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott

Moore, Deputy Associate General Counsel, Robert Sewell on brief) for Petitioner; (John A. McGuinn, Farmer, Shibley, McGuinn & Flood; Roger Schnapp, Senior Labor Counsel, American Electric Corporation on brief) for respondent (Respondent was not present to argue).

PER CURIAM:

The National Labor Relations Board seeks enforcement of an order that Indiana & Michigan Electric Company pay interest on accumulated leave pay which the company had withheld during a strike. The Board concluded that the company had violated § 8(a)(1) and (3) of the National Labor Relations Act by refusing to disburse accrued earnings during the strike. This refusal, the Board held, amounted to a coercion to refrain from protected employee activity. The sole issue on this appeal is whether the Board's order was based upon substantial evidence. We conclude that it was.

ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

November 23, 1979

TO: Elliott Moore, Esq.
Helen L. Morgan, Esq.

Emil C. Farkas, Esq.

Guy Farmer, Esq.
John A. McGuinn, Esq.

Roger Schnapp, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 78-1753, 78-1754 this date. The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time — A petition may be filed within 14 days after judgment. *No extensions will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose — A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict of another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A Petition shall contain an introductory statement that, in counsel's judgment, one or more of the situations exists which is described in the "Purpose Section" discussed above. Thereafter, the points to be raised, succinctly stated, shall then be listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
Clerk

Enclosure

4CCA 28
Rev. 9/17/79

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1753

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INDIANA & MICHIGAN ELECTRIC COMPANY,
Respondent.

No. 78-1754

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

Upon consideration of the motion to file petition for rehearing out of time, and with the concurrence of Judges Winter and Sprouse,

IT IS ORDERED that the motion to file petition for rehearing out of time be, and it hereby is, granted.

Upon consideration of the petition for rehearing, and with the concurrence of Judges Winter and Sprouse,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

/s/ CLEMENT F. HAYNESWORTH

Chief Judge, Fourth Circuit

January 16, 1980

236 NLRB No. 110

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDIANA & MICHIGAN ELECTRIC COMPANY

and Case 9-CA-10874-1

RALPH CALLENDER, an Individual

and Case 9-CA-10874-2

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

DECISION AND ORDER

On February 16, 1978, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified below and to adopt his recommended Order.

[1] Although the Administrative Law Judge found that Respondent is a subsidiary of American Electrical Power Service Corporation, the record establishes and we find that Respondent is a subsidiary rather of American Electric Power Company.

We agree with the conclusion of the Administrative Law Judge that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding accumulated leave pay, but we do so for reasons other than those articulated by the Administrative Law Judge.

Briefly, the records shows that Respondent and the Union were parties to a collective-bargaining agreement that expired on November 17, 1976, at which time the employees went on strike.

Respondent's crews work two 6-hour shifts each 24-hour working period and normally remain aboard the boats for 21 consecutive days before being relieved by another crew. Each employee will then normally remain ashore for 21 days during which time he is off duty and on leave. Sometimes business necessity requires that employees stay on duty for more than 21 days or report for duty before their 21 days of leave are finished. For each day worked an employee receives wages for 2 days: the day worked and a day of leave. There are two pay periods a month. When an employee is paid, the check stub indicates whether the pay the employee is receiving is for a workday or a leave day. The "work" days are always paid first before any "leave" days are paid out. Employees cannot chose to take a lump sum payment in lieu of actual leave time. Any excess leave days are accumulated until the employee has opportunity to go on leave. (Vacations are, however, paid out in a lump sum as a percentage of annual pay.)

On November 17 the strike commenced, and all employees on duty at that time walked off the boats (with the exception of a small security force which remained on duty by agreement of the parties). On November 18 a written notice was mailed to all employees by George Shamblin, manager of the riverboat division, announcing the pay policy to be followed during the strike. Employees who

left the boat to go on strike would not be placed on accumulated leave status and would receive no pay from the time they went on strike. Employees who were already on accumulated leave would remain on leave status for a total of 21 days since they last left the boat (or less if they had not accumulated 21 days of leave time.) If those employees did not return to work after the 21 days, their pay would cease. The memo ended, "Pay will begin for an employee when he returns to work." Respondent followed the above-described leave policy until the strike ended on December 29.

In our view, Respondent's actions evinced an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike.[2] It was not until after the employees had gone on strike that Respondent promulgated the policy of refusing to pay employees accumulated leave until they return to work. Each employee who had been on duty at the inception of the strike was informed that he would receive no pay from the time of the strike, that he would not be placed on accumulated leave pay status, and that "pay will begin for an employee when he returns to work." If the employees who had already been on leave did not report for work, i.e., abandon the strike, after the 21-day period, all pay would stop regardless of whether that employee had additional accumulated leave time. Again, pay would begin when the employee returned to work, despite the fact that, for both groups of employees, the pay had already been earned.

The purpose of the leave policy clearly was to force employees to abandon the strike. Whether or not Respondent also had valid business reasons for withholding

[2] Respondent, in its brief, argues that, "one of the few countervailing economic weapons available to the employer was to defer accumulated leave status for the striking employees until the termination of the strike," thus, conceding that its purpose was to force the strikers back to work.

pay already earned is of no consequence here. Such discriminatory action, in retaliation for employees' exercise of rights guaranteed in Section 7 of the Act, is prohibited. Accordingly, Respondent has violated Section 8(a)(3) and (1) of the Act by initiating a policy, in direct response to the strike, of withholding pay that was already worked for and earned that was clearly calculated to force employees to abandon the strike.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Indiana & Michigan Electric Company, Cedar Grove, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached Appendix C is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. June 14, 1978

_____

John H. Fanning, Chairman

_____

John A. Penello, Member

_____

John C. Truesdale, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and we intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To act together, including the right to strike, for collective bargaining or other mutual aid or protection

To bargain collectively through representatives of their own choosing

To refrain from any or all these things.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of these rights.

WE WILL NOT withhold wages already earned, or otherwise discriminate against employees, because of any union activity, including strikes.

WE WILL pay employees interest for the time their wages were withheld.

INDIANA & MICHIGAN ELECTRIC COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any question concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street - Federal Office Building, Room 3003, Cincinnati, Ohio 45202, Telephone 513-684-3634.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INDIANA & MICHIGAN ELECTRIC COMPANY

Case No. 9-CA-10874-1
9-CA-10874-2

RALPH CALLENDER, An Individual

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Donald Hordes, Esq.,
Cincinnati, OH, for the General Counsel.
John A. McGuinn, Esq.
(Farmer, Shibley, McGuinn & Flood)
Washington, D.C. and
Roger H. Schnapp, Esq., New York, NY,
for the Respondent.
Mr. Ralph Callender, Charleston, WV,
for the Individual.
Mr. Columbus Spears, Bancroft, WV,
for the Union.

DECISION

Statement of the Case

JAMES M. FITZPATRICK, Administrative Law Judge: This case involves the right of an employer during an economic strike to defer until after the end of the strike leave status and pay accumulated by strikers before the strike. As set out below, I find withholding the pay was an unfair labor practice.

These proceedings originated on December 7, 1976[1] with charges filed by Ralph Callender an individual, against Indiana & Michigan Electric Company (Respondent). On December 8, United Steelworkers of America, AFL-CIO-CLC (the Union) also filed charges against Respondent. Thereafter the Union amended its charges on February 15, 1977 and Callender amended his on February 25, 1977. On February 3, 1977 a complaint based on the initital charges issued and on March 29, 1977, an amended complaint based on the amended charges issued alleging that Respondent had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act) by refusing to pay employees for accumulated leave time during an economic strike in effect from November 18, 1976 to January 5, 1977. Respondent answered, denying it had refused to pay for accumulated leave time or had engaged in unfair labor practices. It admitted all other allegations in the complaint. The issues were tried before me at Charleston, West Virginia on May 18, 1977.

Based on the entire record, including my observation of the witnesses and consideration of briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. The Employer Involved

Respondent, an Indiana corporation, is a public utility engaged in the generation, transmission, and sale of electric power in Indiana and other states.[2] During the calender year preceding issuance of the complaint, a

[1] All dates herein are in 1976 unless otherwise noted.

[2] Respondent is a subsidiary of American Electrical Power Service Corporation headquartered in New York City.

period representative of its operations, Respondent received gross revenues exceeding $250,000 and purchased and received goods and materials valued at over $50,000 which were shipped to its Indiana facilities directly from outside Indiana. I find Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Among other activities Respondent operates a River Transportation Division, which has its principal office at Cedar Grove, West Virginia, and which is involved in the transportation of coal to various electric power plants by tow boat and barge on inland waterways of the United States, specifically the Ohio, Kanawha and Green Rivers. It is these operations which are involved in this case.

II. The Labor Organization, the Collective Agreement, and the Strike

Respondent has recognized and bargained with the Union as the representative of about 200 of its employees in two bargaining units, each with its own local union and each having a separate contract. One unit, commonly called the "officers unit," is represented by Local 14529 of the Union. The other, called the "deckhands unit," is represented by Local 14811 of the Union.

Respondent and the Union on behalf of each of the units were parties to two collective-bargaining agreements covering the 3 years preceding November 18, 1976.

The "officers unit" contract covered Master-pilots, Pilots, Operators, Engineer-Deckhands, and Engineers. As of the contract expiration date there were about ninety employees in this unit, only about thirty-seven of whom are involved in this case, the other fifty-three being Master-pilots and Pilots for whom the General Counsel seeks no relief.

The "deckhands unit" contract applies to all other non-supervisory personnel on the boats and docks which number about 120. However, this case only involves 85 of these who worked on boats, the other 35 being "dock" or "terminal" employees about whom there is no issue.

When these collective-bargaining agreements expired at midnight on November 17, 1976, employees covered by them commenced an economic strike. Prior thereto the parties had held four or five negotiating sessions looking toward successor agreements but had not reached agreement. During the strike negotiations continued, eventually resulting in agreement on December 29 or 30 when the strike ended. Except for a limited number of employees, who by special agreement between Respondent and the Union remained aboard as a security watch, all but four covered employees honored the strike.

III. The Alleged Unfair Labor Practices

A. *Tours of Duty and Leave*

Respondent's crews, including the employees involved here, work two 6-hour shifts each 24-hour working day and normally remain aboard the boats for 21 consecutive days before being relieved by another crew. Thereafter they normally remain ashore for 21 days during which they are off duty and are on leave. On occasion, when operations so require, work tours extend beyond 21 days, and sometimes crews are recalled early before they have used the 21 days leave.

For each day worked an employee earns wages for 2 days, the day worked and 1 day of leave. Thus, with a normal 21-day tour of duty an employee earns pay for 21-work days and 21 leave days. Employees are allowed to accumulate leave they have been unable to use because of

extended tours aboard or because of early recall to duty. Most, if not all, of the employees here involved had accumulated such unused leave.

B. *Pay Periods and Pay Days*

Riverboat Division crews have two pay periods each month, the first covering the first 15 days of the month and the second covering the balance of the month. Payday for the first of these pay periods is on the 22nd of that month and for the second pay period is on the 7th of the following month.

Each paycheck includes pay at the employee's job classification rate for the number of days in the applicable pay period for which the employee is entitled to pay, whether work days or leave days. But the paycheck stub indicates how many workdays and how many leave days are being paid for.

C. *Pay During the Strike*

When the strike commenced at mid-night on November 17, approximately half the crews were on duty aboard boats and half were on leave. All those on duty walked off the boats.[3]

On November 18, immediately after the strike commenced, George Shamblin, manager of the Riverboat Division, mailed a written notice to all division employees stating in part as follows:

* * *

Here is the pay policy the company will follow during the strike: Employees who left the boats and went on

[3] As noted hereinabove, Respondent and the Union by mutual agreement arranged for a small security watch of sixteen or seventeen employees to remain aboard during the strike.

strike shall receive no pay from the time they left the boats. They shall not be put on accumulated leave pay status.

Boat employees now on accumulated leave shall be kept on that status until 21 days from the time they last left the boat, or earlier if they had less than 21 days accumulated. If they do not come back to work then, their pay will stop.
Terminal employees on strike shall receive no pay from the time they went on strike.

Pay will begin for any employee when he returns to work.

* * *

On November 22, the payday following the start of the strike, which covered the first 15 days of November, all employees received their normal pay for the pay period. On the next payday December 7, those who walked off received pay only for November 16 and 17. Those on leave at the start of the strike received accumulated leave pay in accordance with the notice.

When Ralph Callender, the individual charging party here, who was employed by Respondent as a deck engineer, received his copy of this notice, he telephoned Shamblin. Being unable to reach him, he talked instead with Respondent's personnel manager Musgrave and asked on what ground Respondent was taking this action. Musgrave indicated that accumulated leave pay was similar to vacation pay or sick leave pay and that Respondent was justified in stopping it at any time. Callender protested that he did not understand how they could hold up payment of money the employees had already worked for and earned.

After talking with Musgrave, Callender waited for his next paycheck to see whether accumulated leave pay

would be included. It was not, so in early December, he called on Shamblin. Among other things, he showed Shamblin the charges he was preparing to file with the Board. During their conversation Shamblin reaffirmed the position taken in his November 18 notice. He told Callender the employees were not going to get beat out of their money, that they would get it, but would have to return to work first. As already found, subsequent to settlement of the strike the employees received all unpaid accumulated leave pay earned before the strike.

D. *Respondent's Reasons*

Shamblin's direct testimony reveals two reasons for withholding accumulated leave pay during the strike. First, Respondent considered it a legitimate economic weapon to combat the strike. Second, Respondent hoped to avoid expected problems in manning its boats after the strike ended.

In this latter respect the record shows that during an economic strike 3 years earlier it continued to pay out accumulated leave pay without interruption to the extent that employees had earned it. By the end of that strike, all accumulated leave having been used, employees were eager to return to work promptly so their pay could resume. Those with greater seniority and qualifications exercised their seniority to return for the first tour of duty following the strike even though some thereby "bumped" more junior crewmen in lower job classifications. This left many more junior employees on shore without incoming paychecks. Following that tour of duty an inordinate number of employees in higher classifications came ashore for the normal leave. The crews relieving them included an unusually large number of the more junior employees and too few with adequate experience in the higher job classifications so that Respondent had difficulty marshalling competent crews.

By contrast, when the strike involved in the present case ended, crews returned to work in a normal mix of greater and lesser qualified employees which facilitated efficient manning of the vessels.

E. *Discussion*

The General Counsel asserts that by deferring employee leave status and pay until after the strike ended or until an employee returned to work, Respondent withheld wages already earned while dangling before the employees immediate payment to entice them to abandon the strike. This, it is urged, was inherently destructive of vital employee rights which necessarily discouraged membership in the Union in violation of Section 8(a)(1) and (3) of the Act. In support of this contention counsel cites *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507 (1975); *Cavalier Division of Seeburg Corporation*, 192 NLRB 290 (1971); and *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26 (1967).[4]

The *Whitfield* and *Cavalier* cases are not entirely analogous because there, as in *G.C. Murphy Company*, 207 NLRB 579 (1973), and unlike the present case, the employer made no showing of business justification for withholding accrued vacation benefits during an economic strike. The same factual distinction can be made, as Respondent points out, respecting *Great Dane Trailers*. But that case, nevertheless, remains persuasive authority for the General Counsel because of the general principles stated.

The General Counsel contends that no economic justification has been shown here. But, as set out hereinafter, I

[4] See also the following cases noted in Respondent's brief: *N.L.R.B.* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612 (C.A. 7, 1970); *N.L.R.B.* v. *Frick Company*, 397 F. 2d 956 (C.A. 3, 1968); and *Knuth Bros., Inc.*, 229 NLRB No. 176 (1977).

find some, although not very weighty, business justification.

A further point made by the General Counsel, which I deem to be the crux of this case, is that Respondent held back wages already earned by some 182 employees because they went on strike.

Respondent argues to the contrary that after the strike began employee rights to accumulated leave pay were not fully accrued, that it did not withhold anything to which they were then entitled, that leave pay is inseparable from leave status, and that it only deferred (or rescheduled) leave status (and with it leave pay) until after the strike when it had less adverse impact on Respondent's operations. Respondent urges that *Texaco Inc.*, 179 NLRB 989 (1969), in which the Board held that an employer did not violate Section 8(a)(1) and (3) by deferring the scheduling of paid vacations until after a strike ended, is analagous and should be dispositive. I disagree because although *Texaco* on its facts is quite similar to the present case, it involved withholding of a fringe benefit while this case involves the mainstream of compensation. This quantitative difference is, in my view, sufficient to be a difference in kind.

Respondent also claims that its deferral of accumulated leave status and pay was a legitimate economic weapon in combatting the strike, citing *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477 (1960); *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965); and *N.L.R.B.* v. *Burns Int'l. Security Services, Inc.*, 406 U.S. 272, 288 (1972). In its brief Respondent argues as follows:

> Here the Union exercised its undeniable right to strike the employer and to exert its maximum economic power by seeking to shut down the Company's barge operations. That exercise of power was largely

successful. One of the few countervailing economic weapons available to the employer was to defer accumulated leave status for the striking employees until the termination of the strike.

Logically this argument has appeal if only the cases Respondent cites on this point are considered. However, the Supreme Court has spoken further in *Great Dane Trailers, Inc., supra*, 33-34, indicating that management and labor are not completely ungoverned gladiators in the economic arena in view of the Board's "duty to strike the proper balance between the asserted business justifications and the invasions of employee rights in the light of the Act and its policy."

Respondent also asserts that it treated strikers and non-strikers "equally". This is based on Shamblin's testimony that they were not treated "differently". In fact they were treated differently. When the strike began Respondent was in a dilemma. Although it knew that those who walked off the boats were on strike, it did not know whether those on leave would strike. The Company made no immediate effort to test the will to strike of those on leave by forthwith recalling them to duty.[5] It allowed them to remain on leave with pay uninterrupted until 21 days of their leave had been used. Thus, economically they were better off during the early part of the strike than those who walked off boats when the strike began in that their pay continued to flow until the end of their normal shore leave. I find that Respondent temporarily at least, treated those on leave, whose attitide toward the strike was still untested, better than those who walked off the boats, and offered the best treatment of all to any who would abandon the strike. This discrimination demon-

[5] The expired collective-bargaining agreements had permitted the Company to recall crews from leave to active duty when necessary.

strates that Respondent's action was "inherently destructive of employee interests." *Great Dane Trailer, Inc., supra*, 32-34, and cases there cited.

At the core of Respondent's position is its insistence that leave pay and leave status are inseparable. It reasons that those who walked off the boats had no fully accrued right to accumulated leave because under the expired contracts crews became entitled to leave (a) upon being relieved by another crew or (b) by mutual agreement between an employee and the company when leave status would not interfere with normal operations.[6]

This argument is supported by the contracts to the extent that leave pay was associated with leave status in those provisions which bear upon the Company's normal method of operation. But in my opinion the argument is strained when applied to a post-contract economic strike situation. Cf. *Glomac Plastics, Inc.*, 194 NLRB 406, 412 (1972).

[6] The officer's unit contract, Article XVI(d) provided that:

> Accumulated time shall be taken in a manner which will not interfere with the normal operations of the Company's business.

Also, subsection (f) of the same agreement provided:

> The Company agrees to see that an employee subject to this Agreement takes his time off at a mutually agreeable time that will not interfere with the proper operations of the boat.

The deckhands' unit contract, Article XX, subsection 3, provided that:

> The Company agrees to see that all employees take their time off at a mutually agreeable time that will not interfere with the proper operation of the boat.

Also, Article XXII, subsection (d) of that agreement provided the following:

> Free time shall be taken in a manner which will not interfere with the normal operations of the Company's business and free time may not be resold to the Company.

There must surely be some situations in which entitlement to accumulated leave pay is not inexorably tied to leave status. For example, I cannot believe, although there is nothing in the record on the point, that Respondent would deny or delay payment of accumulated leave pay which has already been earned to an employee who resigns or to one who is discharged. Respondent is not in a stronger position because a strike existed and withholding pay would strengthen its hand. The Board has already expressed disapproval of such a defense. See *Cavalier Division of Seeburg Corporation*, 192 NLRB 290 (1971).

It is important, it seems to me, to recognize that the system of alternating periods of duty and leave, peculiar to this industry, exists to accommodate Respondent's towboat operation which normally requires that crews remain aboard 24 hours a day for 3 weeks. The necessary 3 weeks respite which follows benefits the employer as well as the employees in that it assures rejuvenated crews for subsequent duty. The pay system, in evening out the flow of compensation, clearly benefits the employees. But in no case does a crew member receive compensation (whether designated duty pay or leave pay) for which he or she has not already worked. Being on leave does not earn the pay. It is the work which earns all the pay as well as the leave. So it does not follow that use of the one benefit (leave) is a necessary condition precedent to receiving the other benefit (wages already earned).

While recognizing that this system of duty, leave, and even flow of compensation benefits the employees, it appears absolutely essential for the efficient operation of Respondent's business and exists chiefly for that reason. When that system becomes inoperative, as it did in this case when the collective agreements expired and the strike began, it is reasonable that the employer rather than the employees bear the burden of that breakdown and it is unreasonable for the employees to be deprived,

even temporarily, of wages already earned. The unreasonableness is underscored by the nature of what was withheld, that is, not a mere fringe benefit, but the whole wage for which employees had already given their labor. Thus, their ability to provide the necessities for themselves and their families was directly affected.[7] From Shamblin's testimony, it is clear that one reason the Company chose this action was to combat the strike. I find the impact of this was not comparatively slight but rather was inherently destructive of important employee rights.

In its brief Respondent argues that it had two substantial, legitimate business justifications for its action. The first of these asserted justifications is:

> The Company was attempting to operate during the strike. In order to operate and survive financially during the strike, it was necessary that all available employees report to work. ... In order to get all available employees who chose to work during the strike, the Company deferred placing employees on accumulated leave since to do so would definitely

[7] The public policy against undue delay in paying wages to laborers is exemplified by legislative enactments in various states in the Ohio Valley where Respondent operates. By way of illustration, Pennsylvania, Ohio, Kentucky, West Virginia, Indiana and Illinois all border the Ohio River or its tributaries in the vacinity of Respondent's operations. In the Codes of most of these States, a sanction is provided for withholding wages already earned. For instance, the Ohio Rev. Code Ann §4113.15 provides that semi-monthly payment of wages is required of an employer and failure to do so will result in a misdemeanor conviction. Similarly, W. Va. Code §23, Ch 5-5 also imposes misdemeanor penalties on employers, who refuse to pay wages already earned. Illinois (ILL Rev. St Ch 48, §39 m 4) and Pennsylvania (Pa. Stat. Ann. tit. 43, §251-252) are also clear in the penalties, which are imposed for withholding earned wages. Even Indiana, which does not specifically address the issue, acknowledges the need to provide for a remedy in the event of a change of pay rate without notice. (Ind. Code §22, Ch. 2-8-1.)

"interfere with the normal operation of the Company's business.

In referring to Respondent's action as a deferral of leave, counsel glosses over the essence of Respondent's conduct which was deferral of wages already earned. Moreover, if, as Respondent contends, employees being on leave status was interfering with normal operations, such might have been alleviated by immediately recalling those already on leave, a measure which the Company did not take.

What may fairly be said is that Respondent acted to combat the strike, which legitimately could have done if such were not inherently destructive of important employee rights.

The second asserted business justification, that Respondent acted in part to assure viable crews for tours of duty following the end of the strike, has some merit. The record shows that three years earlier Respondent had experienced a problem of this nature, and also that the problem did not recur after the instant strike. Accordingly, I find some business justification existed for Respondent's action. But it does not seem to me to be a substantial reason for holding back wages already earned. In the first place, it was not the sole reason, for Respondent's action. Shamblin's testimony indicates that it was not the only reason. The circumstances indicate that combatting the strike was the major reason. Secondly, the problem of scheduling duty tours following the end of the strike was a logical subject for collective bargaining. The necessity for punishing employees by unilaterally withholding their earnings in order to achieve this business objective is not apparent.

In sum, I find here that on the one hand Respondent had a legitimate, but insubstantial, business reason for its action, but on the other hand, that action had a serious, adverse impact on employee rights. Among other adverse

results, Respondent's action discouraged membership in the Union. In these circumstances no specific showing of a subjective intent to discriminate is required to establish violations of Section 8(a)(1) and (3) of the Act. *Radio Officers* v. *N.L.R.B.*, 347 U.S. 1744 (1954); *N.L.R.B.* v. *Erie Resistor Corp., et. al.* 373 U.S. 221, 227-229, 231, 236-237 (1963); *N.L.R.B.* v. *Burnup & Sims Inc.*, 379 U.S. 21, (1964). See *N.L.R.B.* v. *Brown Food Store, Inc.*, 380 U.S. 278, 282-283, 287 (1965); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34, (1967). Respondent has not carried its burden of showing a substantial business justification for its action. *N.L.R.B.* v. *Frick Company*, 397 F. 2d 956, 962 (C.A. 3, 1968). Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding from November 18, 1976 to January 7, 1977 payment of wages for accumulated leave time of employees listed in Appendices A and B hereto, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. Such unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to

implement the policies of the Act. It is unnecessary here to order Respondent to reimburse affected employees for lost earnings because Respondent has already done so subsequent to the conclusion of the strike. However, because the employees discriminated against, listed in Appendices A and B hereto, are entitled to interest for the time earned wages were withheld beyond a normal payday, I will order that Respondent make each of them whole in accordance with the standards set forth in *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[8] No deductions for interim earnings are indicated because the wages involved had already been earned.

Considering that Respondent has various on shore facilities and numerous vessels, and in order to assure that all affected employees are apprised of employee rights involved herein, I recommend that Respondent post appropriate notices on all its towboats, at all its docks, and at its Cedar Grove and Green River facilities, and also mail a copy of the notice to each employee in the bargaining units involved herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[9]

---

[8] See, generally, *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962).

[9] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withholding payment of wages earned by employees, or otherwise discriminating against employees, because they engage in strikes or other union or protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Make whole the employees listed in Appendices A and B by paying each interest on wages withheld for the period withheld in the manner set forth in the section of this Decision entitled "The Remedy".

(b) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount of interest due under the terms hereof.

(c) Post at Respondent's facilities at Cedar Grove and Green River, at all its docks and on all its towboats, and mail to each employee in the bargaining units involved herein, copies of the notice attached hereto marked "Appendix C".[10] Copies of said

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[10] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent, shall, immediately upon receipt thereof, be mailed to the employees by Respondent and also posted for a period of 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said posted notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. February 16, 1978

JAMES M. FITZPATRICK
Administrative Law Judge

APPENDIX A

The 83 employees on duty aboard vessels who walked off when the strike began at mid-night November 17, 1976.

ABSHER, Eugene E.
ALDERSON, James
BAILEY, Paul L.
BEALE, Nellie E.
BOGGS, Charles E.
BONEY, Donnie L.
BONEY, Ronnie D.
BRADFORD, Brent E.
BROWN, Mike D.
BURDETTE, Fred
BURKE, Walter L.
BUSH, Donald E.
CANTU, John E.
CALLENDER, Ralph E.
CARTER, Chila
COOPER, Jimmie L.
CRACE, Lonie F.
DARST, Earl B.
DOMINEY, Margaret H.
DOSS, Bruce H.
DYE, Keith A.
FERGUSON, David
FISHER, Donald E.
FREER, John R.
GARRETSON, Lona A.
GIBBEAUT, Sidney O.
HALL, Billy T.
HARLESS, John W.
HARTLEY, James R.
HENRY, Robert E.
HIGGINBOTHAM, Ralph
HIGGINS, Kenneth
LACY, Edith E.
LEGG, Jeffrey L.
LEWIS, Tommy
McCOMAS, Robert
McLAUGHLIN, Harry
McSURLEY, Gregory
MOREHEAD, Fred E.
NEWMAN, Shirley L.
NIBERT, Bruce H.
NULL, David E.
PARSONS, Jack
PAULEY, Donald
PERKINS, William
PERSINGER, Gary E.
PHILLIPS, JR., Roy
PIKE, JR., James
PRICE, James E.
PRICE, Richard
PULLEN, Stephen R.
REED, James S.
ROBERTS, James M.
ROCKER, II, John A.
ROUSE, Mary
RUPE, Floyd
SALT, Albert
SCHERER, Robert
SHORT, Larry W.
SIMPSON, James
SPANGLER, William R.
STOVER, Darrell W.
STRUGEON, Allen E.
SWANN, Allen F.

HUSSELL, Harry A.
JARRELL, Virgie E.
JOHNSON, Icie F.
JOHNSON, Nellie J.
JONES, Philip
KEEFER, Wilmer
KESSINGER, JR., Lloyd
KETERSON, John
KING, William
KIRK, Ella
KIRKPATRICK, Richard L.
TABIT, Sfrona M.
TERRY, Arthur R.
VANNATER, Lee Roy
WAMSLEY, William
WAUGH, Margaret
WEISEND, Michael A.
WOOLWINE, Sylvia
YOUNG, Eula M.

APPENDIX B

The 99 employees on accumulated leave when the strike began at mid-night on November 17, 1976.

ABRAMS, Ralph J.
ABSTON, Roy D.
ALLEN, Myrtle I.
ARBAUGH, William K.
ATER, Herbert R.
BAILEY, Donald
BAILEY, Loran A.
BAILEY, Lyal G.
BAKER, Daniel
BAYS, David B.
BLACKSTOCK, Ronnie D.
BREWER, Terrance K.
BRIGGS, Keith A.
CANTERBURY, JR., Caryl
CANTERBURY, Roy L.
CARTER, Robert L.
CASDORPH, Bobby
CONNARD, Ronald D.
COPLEY, Mark A.
COX, John
COWAN, Ronald K.
CRIMMONS, Kenneth
DAMON, Steven T.
DAWSON, John L.
DISHMAN, Kenneth
ELDER, Daniel J.
ESTEP, Scotty L.
ESTES, Arthur E.
FOUTS, James
FRANKLIN, Betty L.
GARDNER, Edward
GARRISON, Agatha M.
KIERSTEAD, Carl
KING, Eva E.
LADLIE, William B.
LAWRENCE, Dolly H.
LAYTON, Terry L.
LEE, Lawrence
LEMASTER, Randy M.
LUCAS, Henry L.
LYDEN, Marion
McCORT, Gerald
McDERMITT, Charles P.
McKINNEY, Patrick O.
MEADOWS, Okey R.
MILLER, Corbett M.
MILLER, Robert M.
MONTGOMERY, Robert
MOORE, Nathan E.
PATTERSON, Carol
PATTERSON, Howard
PAYNE, James
PHILLIPS, William J.
PICKERN, Claudette J.
POEHLMAN, Harold W.
PRITT, John M.
RAMEY, Howard
REAVIS, Terry D.
RIFE, James B.
ROGERS, Kenneth N.
ROY, Rex L.
RUPE, Bobby G.
SAYRE, Irene N.
SCARLAS, Randall E.

GIVEN, Yevetta E.
GORDON, Elliott
GREENWAY, Kenneth E.
GRUENBAUM, Daniel J.
HANSGEN, Henry
HARRIS, Alvin R.
HAYES, Hershel Burdell
HAYES, James B.
HESS, John W.
HIGGINBOTHAM, Gary
HIGGINBOTHAM, Harold
HILL, Robert
HOLCOMB, Samuel R.
HUDNALL, Corbett
JONES, Daniel T.
JORDAN, Delcie H.
SHERELS, Eugene
SIGMAN, Austin E.
SIMMONS, Ruth J.
SKILES, Brenda J.
SORDEN, David F.
STEPHENS, William G.
TANNER, Jerry L.
TAYLOR, Allen C.
TAYLOR, Dennis R.
TAYLOR, Dwight L.
TAYLOR, Homer D.
TERRY, Ada M.
THORNTON, Stanley E.
URBAN, Dana L.
VANNOY, JR., Donald D.
VOIGHT, William
WARD, Robert
WAUGH, Shirley S.
WILLS, Bernard L.

APPENDIX C

NOTICE TO EMPLOYEES

POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial in which all sides had a chance to give evidence, The National Labor Relations Board has found that we violated The National Labor Relations Act and has ordered us to post this notice.

The Act give all employees these rights:

To engage in self-organization;

To form, join, or help unions;

To act together, including the right to strike, for collective-bargaining or other mutual aid or protection;

To bargain collectively through representatives of their own choosing; and

To refrain from any or all these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT withhold wages already earned, or otherwise discriminate against employees, because of any union activity, including strikes.

WE WILL pay employees interest for the time their wages were withheld.

INDIANA & MICHIGAN ELECTRIC COMPANY

_____
(Employer)

Dated: _____ By: _____
(Representative) (Title)

_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street - Federal Office Building, Room 3003 - Cincinnati, Ohio 45202 - Telephone (513) 684-3634

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1623

In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANA & MICHIGAN ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Washington, D.C. 20570

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 7a-36a) are reported at 236 N.L.R.B. 986.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1979. A petition for rehearing was denied on January 16, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on April 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company withheld its employees' accumulated leave pay in retaliation for their strike activity, rather than for legitimate business reasons.

STATEMENT

1. Petitioner transports coal to various electric power plants by towboat and barge on inland waterways. The nature of petitioner's business ordinarily requires its employees to remain aboard boats for tours of 21 consecutive days, during which time the employees work two 6-hour shifts each 24-hour day. For each day spent by an employee aboard a boat, he is credited with one day of shore leave. Thus, for each day worked on the boat an employee earns wages for two days, the day worked and one day of leave. At the end of 21 days, the employees are ordinarily relieved by another crew and remain ashore on leave for the next 21 days. When the operation of the boats so requires, petitioner sometimes extends employees' tours on the boats beyond 21 days or recalls employees from leave before 21 days. (Pet. App. 8a, 16a.) In those instances, the immediate use of credited leave is temporarily postponed and days of shore leave continue to accumulate for use after the employees are relieved (Pet. App. 16a-17a; Tr. 72, 78-79).[1] Under no other circumstances has petitioner postponed or prevented employees from taking their accumulated shore leave (Tr. 47).

Each month is divided into two pay periods, the first covering the first 15 days of the month and the second covering the balance of the month. Each paycheck includes pay at the employee's job classification rate for the number of days in the pay period for which the employee is entitled to pay, whether work days or leave days. Stubs accompanying paychecks indicate the number of work days and shore leave days for which the employee is being paid. (Pet. App. 17a; Tr. 58-59.)

On November 17, 1976, the collective bargaining agreements between petitioner and the unions that represented its employees expired, and an economic strike commenced (Pet. App. 8a, 16a). Approximately half of the

[1] "Tr." refers to the transcript of the unfair labor practice hearing. "GCX" refers to the General Counsel's exhibits in that proceeding.

total complement of employees was on duty aboard boats on November 17, and virtually all of these employees left the boats and participated in the strike (Pet. App. 17a).

On November 18, the manager of petitioner's Riverboat Division mailed a written notice to all division employees announcing the pay policy to be followed during the strike (Pet. App. 17a). The notice stated, *inter alia* (Pet. App. 17a-18a; GCX 6; Tr. 26):

> Employees who left the boats and went on strike shall receive no pay from the time they left the boats. They shall not be put on accumulated leave pay status.
>
> Boat employees now on accumulated leave shall be kept on that status until 21 days from the time they last left the boat, or earlier if they had less than 21 days accumulated. If they do not come back to work then, their pay will stop.
>
> * * * * *
>
> Pay will begin for any employee when he returns to work.

2. Unfair labor practice charges against petitioner were filed by one of petitioner's employees and the United Steelworkers of America. A complaint issued and the Board concluded that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by implementing, in response to a strike, this policy of withholding accrued leave pay from employees until they returned to work. The Board found that petitioner's actions were motivated by "an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike" (Pet. App. 9a). The Board explained (Pet. App. 9a-10a):

> It was not until after the employees had gone on strike that [petitioner] promulgated the policy of refusing to pay employees accumulated leave until they return to work. Each employee who had been on duty at the inception of the strike was informed that he would

receive no pay from the time of the strike, that he would not be placed on accumulated leave pay status, and that "pay will begin for an employee when he returns to work." If the employees who had already been on leave did not report for work, i.e., abandon the strike, after the 21-day period, all pay would stop regardless of whether that employee had additional accumulated leave time. Again, pay would begin when the employee returned to work, despite the fact that, for both groups of employees, the pay had already been earned.

The purpose of the leave policy clearly was to force employees to abandon the strike. Whether or not [petitioner] also had valid business reasons for withholding pay already earned is of no consequence here. [2] Such discriminatory action, in retaliation for employees' exercise of rights guaranteed in Section 7 of the Act, is prohibited.

The Board entered an appropriate remedial order (Pet. App. 10a-12a, 29a-30a).

3. The court of appeals found the Board's order to be "based upon substantial evidence" and granted enforcement of it (Pet. App. 1a-2a).

ARGUMENT

Petitioner contends (Pet. 12-13) that this case presents the issue of whether, during a strike, a company may, for legitimate business reasons, alter its method of scheduling paid leave time that has not been earned or accrued at the time of the strike. This contention is incorrect. The Board,

[2]The Administrative Law Judge had concluded (Pet. App. 26a-27a) that the Company "had a legitimate, but insubstantial, business reason for its action," which, in view of the "serious, adverse impact on employee rights," did not justify the action within the rationale of *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). The Board expressly stated (Pet. App. 8a) that it did not rely on the Law Judge's rationale.

upheld by the court of appeals, found (Pet. App. 9a) that petitioner had denied its employees leave pay that was earned and had accrued. Moreover, the Board found, and the court below sustained its finding, that petitioner's action was not motivated by a legitimate business justification, but by a desire to coerce its employees into abandoning the strike.[3] The only issue actually presented therefore is whether substantial evidence supports those findings. That issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the facts set forth above demonstrate that there is ample support for the Board's findings.

[3]Petitioner's assertion (Pet. 14) that the Board "evidently concluded that the [petitioner's] policy of deferring leave and leave pay was conduct inherently destructive of employee rights, thereby obviating the need to consider business justification," misinterprets the Board's decision. The Board did not consider business justification because it concluded that, whether or not valid business justification existed, petitioner was not motivated by such purpose. As this Court stated in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963):

> When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous [employer] actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. * * * Such proof itself is normally sufficient to destroy the employer's claim of legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights.

The Board decision here, contrary to petitioner's suggestion (Pet. 13), is consistent with *NLRB* v. *Borden, Inc.*, 600 F. 2d 313 (1st Cir. 1979). There the court, citing *Great Dane*, *supra*, held that where the employer asserts a substantial business justification that is not inherently destructive of employee rights the Board can reject such justification only if reliance on it was "pretextual." 600 F. 2d at 321. Here the Board, in ruling that petitioner's action was motivated by an intent to coerce employees to abandon the strike, did find that reliance on a business justification was pretextual.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

MAY 1980

DOJ-1980-05